

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Agency of Transportation
(Bennington Bypass)

Declaratory Ruling #349

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISMISSAL ORDER

This decision pertains to a Petition for Party Status filed by Nathan Wallace-Senft. As explained below, the Environmental Board ("Board") dismisses the proceeding with prejudice because Mr. Wallace-Senft has failed to establish that he has standing under 10 V.S.A. § 6007(c) to file this request for declaratory ruling.

I. BACKGROUND

On January 29, 1969, the Vermont Highway Department held a public hearing in the Town of Bennington ("Town") pursuant to 19 V.S.A. § 222 to address a proposed highway bypass around the Town ("Bypass").

On February 11, 1992, the District #8 Environmental Commission Coordinator ("Coordinator") issued Advisory Opinion #8-107 ("Advisory Opinion") in which he determined that the Agency of Transportation's ("A.") preferred route for the Route 7 easterly portion of the Bypass, shown in the August 1991 Final Environmental Impact Statement, ("Preferred Route") did not require a permit application pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On July 3, 1997, the Coordinator issued Jurisdictional Opinion #8-107.1 ("Jurisdictional Opinion") in response to alterations to the Preferred Route. The Jurisdictional Opinion states that the altered Preferred Route, including changes in the location of the Bypass and alterations to the intersection of Routes 7 and 9, ("Project") does not require an Act 250 permit.

On August 1, 1997, Nathan Wallace-Senft ("Petitioner") filed a petition for declaratory ruling with the Board, appealing the Jurisdictional Opinion. The Petitioner contends that the Project requires an Act 250 permit.

On September 2, 1997, Bennington County Industrial Corporation ("BCIC") filed a petition for party status and stated its position that the Petitioner lacks standing to bring this request for declaratory ruling.

On September 3, 1997, the Town filed a letter with the Board, raising issues in controversy including whether the Petitioner has standing to bring this request for declaratory ruling.

On September 12, 1997, the Division for Historic Preservation submitted its

comments to the Board.

Also on September 12, 1997, BCIC tiled a letter with the Board, raising issues in controversy including whether the Petitioner has standing to bring this request for declaratory ruling.

On September 15, 1997, the Citizens for Alternatives to the Bennington Bypass ("CABB") filed a petition for party status with the Board.

On September 15, 1997, Environmental Board ("Board") Chair John T. Ewing convened a preheating conference in Montpelier, Vermont. Although the Notice of Prehearing Conference stated that all petitions for party status should be filed on or before September 11, 1997, the Board did not receive a petition for party status from the Petitioner prior to the prehearing conference. At the prehearing conference, Chair Ewing granted an extension to the Petitioner, allowing him to file a petition for party status by Thursday, September 18, 1997. Chair Ewing also granted an extension to the other prehearing conference participants, allowing them to tile or supplement their petitions for party status by Thursday, September 18, 1997.

On September 17, 1997, Chair Ewing issued the Prehearing Conference Report and Order ("Prehearing Order"). In the Prehearing Order, Chair Ewing informed the participants that the Board would take official notice of the Advisory Opinion and the Jurisdictional Opinion and gave the participants until September 30, 1997 to object to such official notice. None of the participants objected to the Board taking official notice of the above documents.

On September 18, 1997, the Petitioner filed a petition for party status.

On September 19, 1997, CABB filed page two of its supplemental petition for party status.

On September 22, 1997, CABB filed pages one and two of its supplemental petition for party status.

On September 26, 1997, AOT filed its Response to Petitions for Declaratory Ruling and for Party Status.

On September 30, 1997, the Bennington County Regional Commission ("BCRC") filed a letter stating its objections to party status.

On September 30, 1997, the Town filed a Motion to Dismiss the Petition and Objection to Party Status.

On October 22, 1997, the Board heard oral argument and deliberated on the preliminary issues of standing and party status in this matter. The following individuals and entities participated in oral argument: the Petitioner by Stephanie Kaplan, Esq., AOT by Scott Whit-ted, Esq., the Town by Robert Woolmington, Esq., BCRC by Gregory Burke, BCIC by Lance Matteson, and CABB by Jill Van **Orden**.

On October 30, 1997, Robert Woolmington, Esq. filed a letter **with** the Board stating that he had just become aware that another member of his **firm** had performed legal work for Board Member Dr. Robert Page. Also on October 30, 1997, Chair Ewing issued a memorandum to the participants stating that any party objecting to Dr. Page's continued participation on the Board in connection with this proceeding shall file a written objection with the Board on or before Thursday, November 6, 1997. None of the participants filed an objection to Dr. Page's participation. This matter is now ready for decision.

II. ISSUES

- A. Whether the Petitioner has standing to bring this declaratory ruling.
- B. If the Petitioner has standing, whether BCIC and CABB have party status in this matter.

III. FINDINGS OF FACT

1. On January **29, 1969**, the Vermont Highway Department held a public hearing in the Town pursuant to 19 V.S.A. § 222 to address the Bypass.

2. On February 11, 1992, the Coordinator issued the Advisory Opinion in which he determined that the AOT's preferred route for the Route 7 eastern portion of the Bypass, shown in the August 1991 Final Environmental Impact Statement (formerly defined as "Preferred Route"), did not require an Act 250 permit application.

3. On July 3, 1997, the Coordinator issued the Jurisdictional Opinion in response to alterations to the **AOT's** preferred route for the Route 7 eastern portion of the Bypass. The Jurisdictional Opinion states that the altered Preferred Route, including changes in the location of the Bypass and alterations to the intersection of Routes 7 and 9 (formerly defined as the "Project"), does not require an Act 250 permit.

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4. On August 1, 1997, the Petitioner filed a petition for declaratory ruling with the Board, appealing the Jurisdictional Opinion.

5. The Petitioner owns real property in the village of North Bennington, Vermont.

6. At its closest point, the Project is approximately 2.24 miles **from** the Petitioner's house. It is separated **from** his property by the eastern slopes of the **Paran** Creek Valley, the Bennington College campus, three shopping malls, and hundreds of acres of open land.

7. At its closest point., the western portion of the Bypass is approximately 0.83 miles **from** the Petitioner's house.

8. In his Petition for Party Status, the Petitioner states that he has standing to bring this petition for declaratory ruling under 10 V.S.A. §6007(c) because he is a resident of North Bennington and because the Project has the potential for significant impacts under the following Act 250 criteria:

- a. criterion 9(B) (primary agricultural soils) because a six acre field of primary agricultural soils would be lost;
- b. criterion 8 (historic sites) because archaeological investigation has revealed a Paleo-Indian tool-making site within the corridor that may be destroyed by the Project;
- c. criterion 8 (historic sites) because a number of historic buildings that are either on or eligible for the State Register of historic places will be destroyed by the bypass;
- d. criterion 8(A) (necessary wildlife habitat and endangered species) because the proposed bypass route will pass through wetlands that contain many species of birds, amphibians, reptiles, mammals, and plants, including wild garlic which is an endangered species; and
- e. criterion 1 (water pollution) because the proposed bypass route will pass close to a number of drinking water supplies that may become contaminated either during the construction of the road or afterwards by salt and other contaminants.

9. In his Petition for Party Status, the Petitioner also states that he would be affected by the outcome of the declaratory ruling under criteria 1, 1 (G), 3, 8,8(A), and 9(B) because he has an interest in the preservation of the following natural resources that would be destroyed by the construction of the Project: primary agricultural soils, archaeological artifacts, historic buildings, wetlands, and water supplies. The Petitioner further states that construction of the Project and destruction of these natural resources **would directly affect his enjoyment of these natural resources.**

IV. CONCLUSIONS OF LAW

The Board may dismiss any matter before it, in whole or in **part**, at the request of any party or on its own motion for reasons provided by the Board Rules, by statute, or by law. Environmental Board Rule ("EBR") 18(D).

A. Whether the Petitioner has standing to bring this declaratory ruling.

[1] "The distinction between standing and party status is slight: a person who wishes to initiate an appeal or declaratory ruling request must demonstrate *standing* to do so whereas the question *of party status arises* when a person wishes to be a party to a proceeding initiated by someone else." Re: Putney Paper Company, Inc., Declaratory Ruling #335, Findings of Fact, Conclusions of Law, and Order at 5-6 (May 29, 1997).

Pursuant to 10 V.S.A. § 6007(c), a jurisdictional opinion of a district coordinator may be appealed to the Board by "the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties entitled to notice under [10 V.S.A. §] 6084, if jurisdiction were determined to exist." 10 V.S.A. § 6007(c). EBR 3(C)(3) states that a jurisdictional opinion may be appealed to the Board "by any person who qualifies as a party under Rule 14(A) or who may be **affected** by the outcome of the opinion." The Petitioner is not the applicant. Further, he is not a party entitled to notice under 10 V.S.A. § 6084 and he does not qualify as a party under EBR 14(A). Thus, there is one way in which the Petitioner may have standing to file this petition for declaratory ruling: he must demonstrate that he may be affected by the outcome of the opinion.

[2] The standard by which the Board evaluates whether a petitioner has standing to bring a request for a declaratory ruling is:

whether such person or entity may be affected by the outcome of a jurisdictional opinion, and .. such standard is identical to the standard established by EBR 14(B)(1)(a) that a person seeking **party** status demonstrate that a proposed development or subdivision may affect his or her interest under any of the ten Act

250 criteria.

e: Wesco, Inc. and Jacob & Harmke Verburg, Declaratory Ruling #304, Memorandum of Decision at 5 (June 30, 1995). See also Putney Paper Company, Inc., Declaratory Ruling #335, Findings of Fact, Conclusions of Law, and Order at 6 (May 29, 1997); Town of Royalton (Carpenter Recreation Area), Declaratory Ruling #320, Findings of Fact, Conclusions of Law, and Order at 5 (Nov. 20, 1996); Hiddenwood Subdivision, Declaratory Ruling #324, Memorandum of Decision and Dismissal Order at 4 (Aug. 29, 1996). Whether or not the Petitioner has standing is solely within the Board's discretion. EBR 14(B)Re: Northern Development Enterprises, #5 W090 1 -R-5-EB, Memorandum of Decision at 7 (Aug. 21, 1995) (decision to grant party status under EBR 14(B)(1) is solely within the Board's discretion).

EBR 14(B)(1) authorizes the Board to grant party status where the petitioner has adequately demonstrated "that a proposed development or subdivision may affect the petitioner's interest under any of the [Act 250 criteria]." Therefore, the Petitioner must demonstrate that his interests may be affected, and thus that he has standing to appeal a jurisdictional opinion, by providing (i) details of his interest in the proceeding, (ii) a description of the location of his property in relation to the project site, (iii) a description of the potential effect of the proposed project upon his interests with respect to each of the pertinent Act 250 criterion. EBR 14(B)(3)(a), (4).

[3] The Board concludes that the Petitioner has not demonstrated that the Project may affect his interests under any of the Act 250 criteria. At its closest point, the Project is approximately 2.24 miles from the Petitioner's house. It is separated from his property by the eastern slopes of the Paran Creek Valley, the Bennington College campus, three shopping malls, and hundreds of acres of open land. In his Petition for Party Status, the Petitioner states that he has standing to bring this petition for declaratory ruling under 10 V.S.A. § 6007(c) because the Project has the potential for significant impact under the following Act 250 criteria:

1. criterion 9(B) (primary agricultural soils) because a six acre field of primary agricultural soils would be lost;
2. criterion 8 (historic sites) because archaeological investigation has

'EBR 14(B) does not create an entitlement to party status; it creates an authorization for the Board to allow the intervention of parties. In re Maple Tree Place Associates, No. 96-559 slip op. at 2 (Vt. Oct. 13, 1997).

revealed a **Paleo-Indian** tool-making site within the corridor that may be destroyed by the Project;

3. criterion 8 (historic sites) because a number of historic buildings that are either on or eligible for the State Register of historic places will be destroyed by the bypass;
4. criterion 8(A) (necessary wildlife habitat and endangered species) because the proposed bypass route will pass through wetlands that contain many species of birds, amphibians, reptiles, mammals, and plants, including the wild garlic which is an endangered species; and
5. criterion 1 (water pollution) because the proposed bypass route will pass close to a number of drinking water supplies that may become contaminated either during the construction of the road or afterwards by salt and other contaminants.

In his Petition for Party Status, the Petitioner also states that he would be affected by the outcome of the declaratory ruling under criteria 1, 1(G), 3, 8, 8(A), and 9(B) because he has an interest in the preservation of the following natural resources that would be destroyed by the construction of the Project: primary agricultural soils, archaeological artifacts, historic buildings, wetlands, and water supplies. The Petitioner further states that construction of the Project and destruction of these natural resources would directly affect his enjoyment of these natural resources.

Although the Petitioner has briefly addressed the potential impacts of the Project under criteria 1, 1(G), 3, 8, 8(A), and 9(B), he has not stated specifically how these alleged impacts would affect his interests. The "affected by" requirement of § 6007(c) and EBR 3(C)(3) concerns whether the Petitioner has standing to bring this declaratory ruling. In order to have standing, the Petitioner must demonstrate how the outcome may affect his interests under the Act 250 criteria, not what effect the outcome may have *in general*. Re: Putney Paper Company, Inc., Declaratory Ruling #335, Findings of Fact, Conclusions of Law, and Order at 8 ((May 29, 1997); Re: Maple Tree Place Associates, #4C0775-EB (Interlocutory Appeal), Memorandum of Decision and Order at 7 (Oct. 11, 1996), *aff'd*, In re Maple Tree Place Associates, No. 96-559 (Vt. Oct. 13, 1997). Because the Petitioner has not demonstrated a meaningful nexus between the Project and an asserted injury to a specific interest, he has failed to demonstrate that he has standing to bring this declaratory ruling request. See Re: Springfield Hospital, #2S0776-2-EB,

Memorandum of Decision at 5-6 (Aug. 14, 1997).²

[4] The Petitioner argues that the Board should determine that he has standing because he represents the interests of the general public, as well as his own, in protecting the natural resources of the Town. In support of his argument, the Petitioner cites Re: Wesco, Inc. and Jacob & Harmke Verb, Declaratory Ruling #304, Memorandum of Decision (June 30, 1995). In Wesco, the Board determined that a group of local citizens, had standing to bring a declaratory ruling petition under § 6007(c) because the group's interests may be **affected** under criteria 8 and 10. Id. at 5. The group was a non-profit corporation consisting of members who owned property in the Town of Richmond, Id. Its purposes were to promote sound and responsible land use planning **and** to participate in matters concerning proposed land use development. Id. Based on the group's purposes, the Board determined that the group was able to demonstrate how the outcome may affect its interests under the Act 250 criteria. Id. In contrast to Wesco, the Petitioner has not demonstrated how the outcome may affect **his** interests under the Act 250 criteria; he has only addressed what effect the outcome may have *in general*. Additionally, a conclusion that the Petitioner has standing to represent the interests of the general public would expand standing beyond the scope of 10 V.S.A. § 6007(c) and EBR 3(C)(3) by allowing Act 250 appeals to be brought by any individual who purports to represent the interests of the general public.

The Board concludes that the Petitioner has not demonstrated that the Project may affect his interests under any of the Act 250 criteria and, therefore, he has failed to establish that he has standing to bring this declaratory ruling request. Accordingly, the Board dismisses this declaratory ruling request with prejudice.

B. Whether BCIC and CABB have party status in this matter

Since the Board dismisses this matter because the Petitioner does not have standing, it need not determine whether BCIC and CABB have party status in this matter.

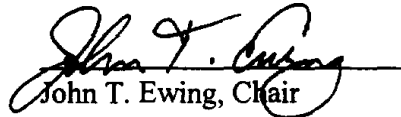
²The Petitioner argues that the Board should view the Project as including the western portion of the Bypass which is, at its closest point, 0.83 miles **from** the Petitioner's house. The other participants argue that the western portion of the bypass is not at issue in this case and that it is a separate project. Without reaching a conclusion on the scope of the Project, the Board concludes that even if the Project includes the western portion of the bypass, the Petitioner has failed to demonstrate that he has standing to bring this declaratory ruling request because he has not demonstrated that the outcome may affect his interests under the Act 250 criteria.

V. ORDER

1. Nathan Wallace-Senft has no standing to file Declaratory Ruling Request #349.
2. Declaratory Ruling Request #349 is hereby dismissed with prejudice.

Dated at Montpelier, Vermont this 12th day of November, 1997.

ENVIRONMENTAL BOARD



John T. Ewing, Chair

Arthur Gibb
Marcy Harding
Samuel Lloyd
William Martinez
Rebecca M. Nawrath
Robert H. Opel
Robert G. Page, M.D.

* Board Member Steve E. Wright did not participate in the deliberations concerning this matter.